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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ELENA SAGAIDATCHNAYA, Defendant and Appellant.	B208166 (Los Angeles County Super. Ct. No. LA051758)

APPEAL from a judgment of the Superior Court of Los Angeles County. Leland B. Harris, Barry Taylor, and Martin L. Herscovitz, Judges. Affirmed.

J. Edward Jones for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Elena Sagaidatchnaya, convicted of presenting a false insurance claim (Pen. Code,[1] § 550, subd. (a)(1)), presenting false statements in support of an insurance claim (§ 550, subd. (b)(1)), and perjury (§ 118, subd. (a)), appeals her convictions and sentence. She alleges that her trial counsel rendered ineffective assistance and that the trial court erred in granting a motion to amend the information, admitting challenged evidence, and in failing to dismiss count 2 as a lesser included offense of count 1. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

After her home was allegedly damaged by a water leak, Sagaidatchnaya hired a public adjustor firm to present her insurance claim. In April 2005, an adjustor from the firm met with Sagaidatchnaya at her home and inventoried the items she claimed were total losses. The information from this inventory was included in a worksheet with blank columns for Sagaidatchnaya to enter the place, date, and cost of purchase for each item. Sagaidatchnaya completed the worksheet and returned it to the public adjustor firm along with copies of receipts to support the items listed on it. Sagaidatchnaya provided receipts from: a Burberry store, purportedly for a Carducci sweater; the St. John Company Store in San Jose; Hugo Boss; Bloomingdale's; and M.Z. Studios N.Y.C. The public adjustor firm submitted the worksheets and receipts to State Farm Insurance, Sagaidatchnaya's insurance carrier.

David Servaes, a State Farm claims representative, met with the adjustor and Sagaidatchnaya at Sagaidatchnaya's home. He photographed the items listed on the worksheet and insurance claim. Servaes was told that a $10,000 lamp, claimed to be a work of art, was damaged by the flood, but he did not see any water damage to the lamp. Sagaidatchnaya told Servaes that a $4,000 vase had been destroyed during the flood when a piece of the ceiling fell on it, and she gave him glass shards that she claimed were the

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

remnants of the vase. Servaes kept the pieces. Later, the public adjustor called to say that he had been given the wrong glass fragments and that they did not in fact belong to the vase.

State Farm claims adjustor Thomas Collier met with Sagaidatchnaya and her attorney, Kevin Kellow, and Kellow gave Collier a second set of glass fragments. Sagaidatchnaya said that these pieces were from the Lalique vase destroyed in the water leak. In the course of his investigation, Collier discovered that the Burberry store did not sell the merchandise Sagaidatchnaya claimed to have purchased there; that the St. John Company Store receipt, purportedly for the purchase of Armani pants, was for a purchase of a gown by someone other than Sagaidatchnaya (a person named Ludmila Gandlin); that a Bloomingdale's receipt supposedly for a sweater had been altered to replace the word "jewelry"; and that the Lalique vase had also been bought by Gandlin.

In June 2005 Collier interviewed Sagaidatchnaya about the items in the worksheet and about a number of receipts that had been given to him. Sagaidatchnaya confirmed that the items in the worksheet reflected her losses. She said she purchased the Carducci sweater and another sweater at a Burberry store. She claimed that the problem with the St. John Company Store receipt must be the result of a misunderstanding or tracking error, and maintained that she did not alter the receipt. Similarly, she maintained that the Bloomingdale's receipt that she claimed to be for a sweater was accurate, and that she had not changed the receipt. She said that a person named Joe Bloum bought the Lalique vase. When Collier disclosed that the vase was purchased by Gandlin, Sagaidatchnaya said Bloum may have had Gandlin's permission to use her credit card. Sagaidatchnaya stated that her $10,000 lamp was a unique work of art that could not be replaced and that she learned of the lamp through E-Bay but bought it directly from the seller.

Sagaidatchnaya was examined under oath by a State Farm attorney on August 19 and September 23, 2005 concerning the items she claimed to have been damaged or destroyed by the water leak.

Sagaidatchnaya was charged with presenting a false insurance claim, presenting false statements in support of an insurance claim, and attempted perjury. Immediately

before trial, the information was amended, over her objection, to allege perjury rather than attempted perjury.

At trial, an expert in materials engineering testified that he had examined the shards of glass that allegedly came from the Lalique vase and concluded that none matched a Lalique vase in size, thickness, surface features, or radius of curvature. A Burberry manager testified that the store did not sell the items Sagaidatchnaya claimed to have bought there and that one receipt she had presented was for two pocket stoles. A Bloomingdale's regional manager testified that two of the receipts (a cashmere jacket and the Lalique vase) were for purchases made by Gandlin's store credit card and that another receipt indicated that the purchased item had been returned. Bloomingdale's stores, the representative testified, did not permit persons to make purchases with credit cards in another's name unless the account listed that person as an authorized buyer. A representative of St. John Knits testified that the St. John Company Store receipt Sagaidatchnaya submitted was missing information, but that the transaction to which it pertained was Gandlin's purchase of a gown. St. John Knits did not permit customers to use credit cards issued in other people's names. A fraud investigator for E-Bay and Paypal testified that Sagaidatchnaya bought the alleged $10,000 lamp through E-Bay and Paypal for $159.

The attorney who had conducted the examinations under oath testified that at both examinations under oath, the court reporter administered the oath prior to questioning. Sagaidatchnaya said that the items damaged were personal to her or to her boyfriend; that "not really" anything in the worksheet was incorrect; that she was present at the time of the Burberry sweater and jacket purchases; that the Lalique vase was a gift that was broken in the water leak; and that the lamp cost $9,309. She said she scanned the receipts into her computer and that the receipts were copied onto a CD and submitted. She also claimed that her computer had been infected with a virus and that the data was not retrievable.

Gandlin testified at trial that she had a Bloomingdale's charge card. She had bought a Lalique vase for approximately $4,000. She owned the vase still and had not

given it away. She had also bought items at St. John's Company Store and Burberry. She did not know Sagaidatchnaya, Bloum, or Sagaidatchnaya's boyfriend, and she had not given any items to them.

Sagaidatchnaya testified that she had given her receipts to the public adjustor firm and that the receipts were for the items destroyed during the water leak. She repeated her claim that the Lalique vase was a gift that was damaged by water; and claimed that although she paid $159 to the lamp seller she also paid him additional money separately to avoid E-Bay fees. She denied falsifying receipts and claimed that she neither lied to State Farm nor lied while being examined under oath.

Sagaidatchnaya was convicted on all three counts. The court imposed the low term of two years for presenting the fraudulent claim; imposed and stayed the low term of two years for making false statements in support of the claim; and imposed a concurrent two-year term for the perjury conviction. Sagaidatchnaya appeals.

DISCUSSION

I. Alleged Ineffectiveness of Counsel

Sagaidatchnaya asserts that her trial attorney failed to object to the introduction of a transcript as hearsay and to the trial court's use of judicial notice; inadequately litigated her motion to dismiss; and failed to request a continuance when appropriate. Sagaidatchnaya argues that this constituted ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668. To establish ineffective assistance of counsel, Sagaidatchnaya must demonstrate that "(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner." (*In re Jones* (1996) 13 Cal.4th 552, 561.) As a general rule, ineffective assistance of counsel claims

are more suited to petitions for habeas corpus than direct appeals. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [a claim of ineffective assistance of counsel relating to "why counsel acted or failed to act in the manner challenged . . . is more appropriately decided in a habeas corpus proceeding"].) We consider each allegation of ineffectiveness in turn.

A. Preliminary Hearing

Sagaidatchnaya contends that the prosecution failed to prove by admissible evidence at the preliminary hearing that Sagaidatchnaya was sworn to tell the truth during her insurance company deposition. At the hearing, the Department of Insurance's criminal investigator testified that he spoke with an insurance company attorney about his examination of Sagaidatchnaya under oath. The investigator testified that the attorney "conducted an examination under oath, which is the same as a deposition, but for these cases they call it the E.U.O. And it's testimony that is taken of the defendant, under oath, regarding the claim and any questions they have regarding the claim." The investigator testified that the attorney told him that "the defendant is sworn in . . . prior to any testimony taking place." The prosecutor also presented evidence of the transcript of Sagaidatchnaya's deposition, which included a conversation in the record in which the attorney explained to Sagaidatchnaya what an examination under oath is.

Sagaidatchnaya's counsel objected to the testimony of the investigator as hearsay, but did not object to the introduction of the transcript. Ultimately, the trial court relied on its knowledge of the practice of conducting depositions, as well as the evidence, to conclude that the prosecution had produced sufficient evidence that Sagaidatchnaya was under oath to establish probable cause to proceed to trial on the attempted perjury charge. Specifically, the court explained that it relied on the start of the transcript of the examination, and that "[t]his is a deposition. And the court will take, almost the equivalent of judicial notice, having practiced in the civil section, although many years ago—and also having been a judge for almost 16 years, that it is the court reporter who is

the one who is legally entitled and [e]mpowered to administer the oath for a witness." The court observed the difficulties inherent in simultaneously administering and transcribing the oath, and noted that the transcript reflected the oath having been given with the phrase, "A witness having been sworn testifies as follows." Finally, the court took "judicial notice of the procedures at depositions, procedures at court, and find that based upon line 2 [of the transcript, reflecting that the witness was sworn], the defendant was duly sworn. Also, based on similarity of names, being the name on line 1 versus the defendant's name before the court, I find through circumstantial evidence, they are one and the same, due to their uniqueness and to the subject matter of this case."

Sagaidatchnaya claims that multiple errors occurred here: that counsel should have objected to the court's taking "the equivalent of judicial notice," to the introduction of the transcript and specifically to the transcript's line about Sagaidatchnaya being sworn, and that counsel should have objected to the court taking judicial notice of facts about depositions. According to Sagaidatchnaya, if it had not been for her counsel's errors, the attempted perjury charge would have been dismissed.

We have reviewed the copy of the deposition that was being discussed at the preliminary hearing (Exhibit 7), and note that it lacks a certification signed by the court reporter that he administered an oath to Sagaidatchnaya. However, at the preliminary hearing the fraud investigator testified that the State Farm attorney who handled this matter told him that he examined Sagaidatchnaya under oath, and this testimony was admissible pursuant to section 872, subdivision (b). Regardless of any error by the trial court in relying on the non-certified examination transcripts, there was admissible evidence before the court at the preliminary hearing that Sagaidatchnaya had taken an oath that she would testify truthfully. Accordingly, there existed such a state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 14), and Sagaidatchnaya was properly held to answer on the attempted perjury charge. Moreover, "[g]enerally, a conviction will not be reversed because of errors or irregularities that occurred at a preliminary hearing . . . absent a showing that the

asserted errors 'deprived [the defendant] of a fair trial or otherwise resulted in actual prejudice relating to [the] conviction.' [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 178.) Sagaidatchnaya has not shown that she was deprived of a fair trial or that she experienced actual prejudice regarding her conviction due to the trial court's ruling at the preliminary hearing.

B. Motion to Dismiss

Counsel moved to dismiss the charges under section 995, but Sagaidatchnaya faults counsel for failing to attack the court's "equivalent of judicial notice" or to argue that there was no evidence that she made any false statements on August 9, 2005, because the first examination under oath took place on August 19, 2005. Sagaidatchnaya has not demonstrated any objectively unreasonable or deficient conduct by her counsel in this regard. Regarding the phrase the trial court used, "the equivalent of judicial notice," the court was simply indicating its understanding that the court reporter who transcribes the deposition also administers the oath to the deponent. The authority to do so is set forth in Code of Civil Procedure section 2093, subdivision (b)(1). Thus, the trial court was merely describing its understanding of the practice of taking depositions, as authorized by the Code of Civil Procedure, and there was no basis for an objection here. Similarly, the information stated, "On or about August 9, 2005" as the date of Sagaidatchnaya's attempted perjury during her sworn examination by Stephen Huchting, when in fact her examination took place on August 19 and September 23, 2005. There was little reason to bring this issue to the attention of the court: not only are the actual dates "about" the date of August 9, 2005, but had counsel objected, at most the information would merely have been altered to reflect the exact date of the examination. Counsel's performance here was not deficient, and Sagaidatchnaya suffered no prejudice, from the conduct alleged here.

C. Motion to Amend

Immediately before jury selection, the prosecutor moved to amend the information to strike the word "attempted" where it appeared before "perjury" in count 3. The motion was granted over Sagaidatchnaya's objection. Sagaidatchnaya contends that her counsel rendered ineffective assistance of counsel when he did not request a continuance to permit him to file a new motion to dismiss "to address the lack of evidence at preliminary hearing as to the new charge." Sagaidatchnaya does not describe, nor can we envision, how this new motion would be different than the earlier, unsuccessful motion to dismiss, or what additional time she would need to prepare the defense when the only alteration in the information was to alleged that the previously-alleged attempted perjury was in fact completed. If additional facts exist that should have prompted counsel to move for a continuance, proof of such matters requires a showing beyond the scope of the record on appeal and may be presented in a petition for habeas corpus. (*People v. Jones* (2003) 29 Cal.4th 1229, 1263 [issues requiring review of matters outside the record are better raised on habeas corpus rather than on direct appeal].) Sagaidatchnaya has not, however, established any ineffectiveness in the failure to request a continuance based on the record on appeal.

II. Motion to Amend the Information

Sagaidatchnaya also alleges that the trial court abused its discretion in granting the motion to amend the information to strike the word "attempted" from count 3. First, she claims the trial court erred because it ruled that an attempted crime is the same as a completed crime. What the court said was, "I see no prejudice, being that it's the same crime on the same day, so I'm going to allow the amendment." We understand the trial court's statement to mean that the court believed that Sagaidatchnaya was not prejudiced by the amendment because it did not change the nature or the details of the criminal conduct she was alleged to have engaged in, and not as a pronouncement that an attempted crime and a completed crime are legal equivalents. As Sagaidatchnaya had

already prepared a defense to the charge of attempted perjury, removing the "attempt" from the perjury charge did not change the nature of the underlying allegations or materially impact her preparation of a defense. The amendment was permitted because Sagaidatchnaya was not prejudiced by it, and Sagaidatchnaya has not demonstrated any manner in which she was in fact prejudiced by the amendment.

Next, Sagaidatchnaya contends that the amendment was not supported by the evidence provided at the preliminary examination because the judge at the preliminary hearing did not "rule that the evidence supported a perjury charge" and the admissible evidence did not support the element that Sagaidatchnaya made a statement under oath. That the judge made no findings about probable cause for a perjury charge is irrelevant, because the question is whether an amendment changes the offense to one not shown by the evidence taken at the preliminary examination. (§ 1009.) Here, there was admissible evidence that Sagaidatchnaya made a statement under oath: the investigator testified that the attorney who conducted the examination stated that he conducted an examination under oath in which she was sworn in prior to the start of testimony. Although hearsay, this testimony was admissible under section 872, subdivision (b). The amendment was supported by the evidence at the preliminary examination.

Sagaidatchnaya contends that she was denied due process when the amendment motion was granted immediately before trial began without the trial court "offering the defense a continuance to regroup and prepare a defense to the new charge." Sagaidatchnaya's trial counsel did not request a continuance or argue to the trial court that the defense was prejudiced in any way by the amendment such that continuance would be warranted, and she has not set forth any specific reason why a continuance was merited by this amendment. Sagaidatchnaya has not established any denial of due process or any obligation on the part of the trial court to grant an unrequested continuance because of an amendment to the information.

In her reply brief, Sagaidatchnaya raises for the first time the argument that she could not properly be tried for perjury, only for attempted perjury, because the evidence admitted at the preliminary hearing did not include an executed signature page for

Sagaidatchnaya's examination under oath. Issues raised for the first time in an appellate reply brief are ordinarily disregarded when the appellant makes no attempt to show good cause for failing to raise the issue in the opening brief. (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1005.) Furthermore, Sagaidatchnaya has not demonstrated that the amendment of the information deprived her of a fair trial or resulted in actual prejudice relating to her conviction. (*People v. Carrington, supra*, 47 Cal.4th at p. 178 [conviction will not be reversed because of errors or irregularities that occurred at a preliminary hearing unless it is shown that the errors deprived the defendant of a fair trial or otherwise resulted in actual prejudice relating to the conviction].

III. Chain of Custody

Sagaidatchnaya contends that the trial court should have excluded from evidence two separate samples of broken glass because of a questionable chain of custody. We find no abuse of discretion in admitting this evidence, as its chain of custody was established by testimony at trial. Both samples of broken glass originated with Sagaidatchnaya or her counsel. One was provided by Sagaidatchnaya to Servaes, who gave it to Collier. The other sample was given by Sagaidatchnaya's attorney directly to Collier. Sagaidatchnaya told Collier that the first set of shards was wrong and that it was the latter set of fragments that had actually come from the Lalique vase destroyed in the loss. Collier took these pieces to Bloomingdale's, where he determined that they did not appear to match the vase from which Sagaidatchnaya claimed they came. Collier, therefore, personally gave the pieces of glass to an expert for further analysis. From the context of Collier's testimony, it is both clear and the only reasonable conclusion that the glass he is describing was the second set of pieces delivered by Sagaidatchnaya's attorney. The expert received the pieces of glass, photographed them, placed them in evidence handling bags, and then performed his analysis. Although at some point three pieces of glass (per the insurance investigation report) became four pieces of glass (when examined by the expert), no vital link in the chain of possession was unaccounted for. The prosecution met its burden of showing to the satisfaction of the trial court that, taking

all the circumstances into account, it was reasonably certain that there was no alteration of the evidence. (*People v. Diaz* (1992) 3 Cal.4th 495, 559.) The trial court did not abuse its discretion in admitting this evidence.

IV. Alleged Sentencing Error

Sagaidatchnaya claims that the trial court erred when it sentenced her on counts 1 and 2 and stayed the sentence on count 2; she claims that the court should have dismissed count 2 as a lesser included offense of count 1.

One offense is a lesser included offense of another if the greater offense cannot be committed without also committing the lesser offense. (*People v. Pearson* (1986) 42 Cal.3d 351, 355, overruled on another ground in *People v. Fields* (1996) 13 Cal.4th 289, 306, fn. 6.) Here, the allegedly greater offense was a violation of section 550, subdivision (a)(1): knowingly presenting or causing to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance. The allegedly lesser offense was a violation of section 550, subdivision (b)(1): knowingly presenting or causing to be presented any written or oral statement as part of, or in support of, a claim for payment under an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact. As one can violate section 550, subdivision (a) without violating section 550, subdivision (b), the latter is not a lesser included offense of the former and was not required to be dismissed on that ground.

Sagaidatchnaya claims that the offenses should be treated as necessarily included because the same conduct, the act of submitting the insurance claim and its documentation on April 6, 2005, is the underlying criminal act that gives rise to both counts 1 and 2. She relies on *People v. Ryan* (2006) 138 Cal.App.4th 360, in which the Court of Appeal concluded that the different methods of committing forgery set forth in section 470 were not separate offenses, but different methods of committing the same crime. (*Id*. at pp. 364-371.) While there is some overlap between the conduct supporting

counts 1 and 2 as they were argued to the jury, count 2 is also supported by acts distinct from the conduct in count 1; Sagaidatchnaya ignores the fact that evidence of criminal conduct beyond the preparation and submission of the insurance claim was presented here. Well after the insurance claim was presented, Sagaidatchnaya was interviewed by Collier and examined by Hutching and made further false statements to support her insurance claim. The prosecutor argued in closing argument that Sagaidatchnaya violated section 550, subdivision (a)(1) when she told the public adjustor which items had been damaged; when she handwrote the cost per item, the place of purchase, and the date of purchase of the claimed damaged items, as well as when she provided receipts that had been altered; and when she pointed out items to Servaes that were allegedly damaged in the leak. The prosecutor then argued that Sagaidatchnaya violated section 550, subdivision (b)(1) not only when she presented altered receipts and the handwritten inventory that constituted a violation of section 550, subdivision (a)(1), but also when she made false oral statements to Collier and in her examination under oath. As the prosecutor argued, "On both of those occasions, the defendant confirmed that she purchased the items, or she was present for their purchase; that the items suffered damage because of this water leak; and that she was claiming damages for all of those items." These further actions, independently criminal and taken after the presentation of the claim, establish that the offenses for which Sagaidatchnaya was convicted in counts 1 and 2 were not, respectively, based on identical criminal conduct. (See, e.g., *People v. Zanoletti* (2009) 173 Cal.App.4th 547, 557-559 [defendant may be guilty of violating multiple subdivisions of section 550 as part of one overall course of insurance fraud: preparation of a writing with the intent to use it to support a false claim is an offense distinct from the knowing presentation of a false claim].)

Sagaidatchnaya argues in the alternative that the knowing submission of the insurance claim and its documentation should be considered as falling under the single-intent doctrine from *People v. Bailey* (1961) 55 Cal.2d 514. In making this argument, in which she claims that "the single intent is to present the information on the disk in support of an insurance claim," Sagaidatchnaya completely ignores the conduct

subsequent to presenting that insurance claim that gives rise to the separate violation of section 550, subdivision (b)(1): namely, her later false statements to State Farm and her examination under oath. (See *People v. Zanoletti*, *supra*, 173 Cal.App.4th at pp. 559-560.) The trial court properly stayed sentence on count 2 pursuant to section 654, but Sagaidatchnaya has not established any reason that the trial court should have dismissed that count.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.